1969. There was never a period exceeding 3 years between any two consecutive payments.

The Bank demanded repayment of the overdraft by a notice in writing on December 15, 1971. When this demand was not complied with, it commenced this action on February 9, 1972.

The defence of the respondent relied squarely on limitation. The period prescribed by the Limitation Ordinance (Cap. 49, Sarawak) is 3 years.

The defence on limitation was determined as a preliminary issue and the learned judge came to the finding that the claims before February 8, 1969 were but the claims from February 9, 1969 to December 31, 1971 were not barred by statute, the suit being filed on February 7, 1972. He also ordered that moneys paid in by the respondent between these two dates be set off against the sum found due and owing by it to the Bank.

This case posed certain difficulties which all sprang from the fact that the overdraft facilities were granted apparently without any terms and conditions, save as to the condition for repayment, which was necessarily to be implied. Rule 11 of the Bank's Rules governing the operation of all current accounts states that overdrafts are allowed only after due arrangement has been made with the Bank. The arrangement in this case would, however, appear to have been made orally and in the absence of any averment in the statement of claim which the respondent admitted, in the absence of any affidavit evidence that such a term existed, there does not appear to be any term that the overdraft was repayable on demand.

Not surprisingly therefore, the learned trial judge held that in the circumstances no demand for repayment was necessary to make the overdraft an enforceable debt, and that the overdraft became due and payable at the time when each loan was made. Time ran from that date: *Bradford Old Bank* v. *Sutcliffe*[2] and *Parr's Banking Co. Ltd.* v. *Yates.*[3] The last advance of $1,000 was made on December 18, 1963, though that was against a payment in of $1,000 the previous day. Thereafter the only life shown in the account was the regular debiting of monthly interests and a few and very sporadic payments by the respondent. In his judgment, the claim for repayment was statute-barred.

However, the fact of the payments by the respondent must, in my view and with respect, be given its full significance.

Section 20(1) of the Limitation Ordinance (Cap. 49, Sarawak) reads as follows:

"20.—(1) When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part payment of the principal of a debt, the fact of the payment shall appear in the handwriting of the person making the same."

On a proper interpretation of this section, it does not appear to be a matter of much importance if the payment which make for a new period of limitation is towards interest only or towards part of the capital. If there was such a payment, it would revive the time for suing.

The last payment was of $100 on December 15, 1969 and in my view and with respect, this payment prevented time from running out so that on the taking out of the writ on February 12, 1972, the claim had not become statute-barred.

I would therefore allow the appeal with costs here and the court below. There will be judgment for the plaintiff as prayed.

Suffian L.P. concurred.

Appeal allowed.

Solicitors: *Yong & Co.; Ee & Lim.*

TAN KIT THONG v. NG SIONG HONG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Chang Min Tat F.J.) April 26 and June 14, 1978]

[Kuching — Federal Court Civil Appeal No. 155 of 1977]

Landlord and Tenant — Rent controlled premises — Claim for possession — Rent in arrears — Rent increased by mutual agreement — No necessity to terminate tenancy before increase — Rent Control Ordinance, (Sarawak Cap. 86), ss. 4 & 8.

In 1961 the appellant became the tenant of the front portion of the ground floor of premises in question at a rent of $220 per month. The owner of the premises subsequently sold it to the respondent. Following an increase in assessment rates the appellant agreed to an increase of the monthly rent on September 1, 1966 to $230. The appellant was in arrears of rent from September to November 1970 and the respondent sent him a notice in Chinese dated November 6, 1970 demanding payment but the appellant made no payment. Notice to quit was served on the appellant and the respondent subsequently brought an action for possession, rent and mesne profits. The High Court gave judgment in favour of the respondent and the appellant appealed.

Held, dismissing the appeal: (1) in this case the rent had been lawfully increased and as the increase was by mutual consent within the limits allowed by law, there was no necessity to terminate the tenancy first;

(2) the rent was in arrears and as it was not paid after demand, the respondent was entitled to have possession.

Case referred to:-

(1) *Sim Bang Hock* v. *Lim Kwong Sin* [1970] 1 M.L.J. 124, 125.

FEDERAL COURT.

Daniel Tejem for the appellant.

J.C. Fong for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned judge ordering appellant to deliver up possession of premises described as No. 146, Padungan Road, Kuching and to pay arrears of rent, mesne profits and costs.

In 1956 Chong Thong bought the premises which were then occupied by a confectioner who later surrendered the first floor and front portion of the ground

floor while retaining the back portion of the ground floor to himself. Chong Thong and family went to live on the first floor. In 1961 appellant became the tenant of front portion of the ground floor paying rent of $220 per month. The confectioner paid $50 per month for the back portion of the ground floor. On April 8, 1965 respondent bought the premises from Chong Thong and lived on the first floor with his family. The two tenants continued paying rents to respondent. Following an increase in assessment rates the tenants consented to an increase of monthly rents on September 1, 1966 to $230 and $70 respectively. As appellant was in arrears of rent from September to November, 1970 respondent sent him a notice in Chinese dated November 6, 1970 demanding payment but appellant made no payment. So, through his solicitors, respondent terminated the tenancy by notice dated December 4, 1970. Appellant refused to quit. In 1971 respondent brought an action claiming vacant possession under section 15(1)(a) of the Rent Control Ordinance (Cap. 86), arrears of rent from September, 1970 to January, 1971, mesne profits from February, 1971 until possession and costs. Eventually, the case came up for hearing in 1977 and respondent was successful. Appellant appealed.

Briefly, appellant submitted that the learned judge was wrong in applying the provisions of the Rent Control Ordinance to the facts. He contended that the learned judge was wrong to say that the permitted increase of rent was within the laws as the annual rateable value applied to the whole premises. The learned judge correctly pointed out that in 1961 there was no order of the Kuching Rent Control Board fixing the rent of the shop premises on the front portion of the ground floor of the premises. There was no evidence to show how much rent the confectioner was paying when he occupied the whole premises. But, in 1961 when appellant became tenant he paid $220 per month and the confectioner $50 per month. So, the learned judge was unable to accept the contention of the appellant that the standard rent was the rent which the confectioner paid. On the evidence, he accepted the submission of respondent that the standard rent of the front portion of the ground occupied by appellant was $220 per month.

The relevant provisions of section 8(1)(d) of the Ordinance provides:—

"8(1) A landlord may increase the rent of the premises let by him only in the cases and to the extent following, namely —

....

(d) where the current rent is less than the annual value on which the premises are assessed under the Kuching Municipal Ordinance or the Local Authority Ordinance, to the extent of twenty-five per cent of the difference between the current rent and such annual value

Provided that —

....

(iii) where premises are the subject of two or more separate lettings by the landlord, for the purposes of this paragraph 'current rent' shall mean the aggregate of the rents received by the landlord in respect of such premises, and the landlord may increase the rent of any such separate letting to the extent of the proportion of twenty-five per cent as aforesaid as such separate letting bears to the whole premises:

[Paragraph (d) inserted by Ordinance 26 of 1951]

Provided that the Board may in any such case make an order fixing the rent, and in such event the landlord shall not increase the rent above the rent so fixed."

Again, the learned judge accepted the contention of respondent that the standard rent of $220 per month was in fact the current rent for the purpose of calculation under section 8(1)(d). The calculation based on the difference between the annual rateable value of the premises and the current rent in 1966 indicated that respondent was in fact permitted to increase appellant's rent up to $62.496 but had only increased the rent by $10. Therefore, the increase was within the provisions of the Ordinance and lawful. Consequently, the learned judge rejected the contention of appellant that the increase in rent was illegal as it had not been approved by the Kuching Rent Control Board by pointing out the increase was made not under section 4 but under section 8. The latter section permits limited increase without having to seek approval of the Kuching Rent Control Board.

We do not think it is quite correct for appellant to say that the learned judge held that sections 4 and 8(2) did not apply to the action as references were made to the provisions.

There is no merit in the contention that the learned judge erred in law in holding that sections 4 and 8(2) did not apply to the action when dealing with the point concerning increase of rent without terminating the tenancy first. He referred to *Sim Bang Hock* v. *Lim Kwong Sin*[1] where this court construed section 8(2) which reads: —

"Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent."

In delivering the judgment of the court, Ismail Khan, then C.J. (Borneo) said:—

"In our view sub-section (2) of section 8 has made no change whatsoever in the common law. It is merely a restatement of principle considered by the legal draftsman to be expedient in case it should erroneously be considered that sub-section (1) entitles a landlord merely on demand, to collect the permitted increase against the will of the tenant. What sub-section (2) means is that the increased rent is exigible only with the tenant's consent. This plainly is so because the landlord is given an appropriate remedy against the recalcitrant tenant by virtue of paragraph (c) of sub-section (1) of section 15, namely, that the restriction on a landlord's right to re-possession is removed:—

'(c) where the landlord, as a step towards increasing the rent in pursuance of the provisions of section 8, has given the tenant a notice to quit and the tenant holds over possession at the expiration of such notice without paying or agreeing to pay the increased rent.'

Where, however, the tenant consents, upon receipt of notice, oral or written, of the landlord's intention to raise the rent and pursuant thereto, pays the increased rent, it is, of course, elementary law that a new tenancy at the higher rent replaces the old thereafter. The old tenancy having been thus determined by mutual agreement, an express notice to quit is wholly supererogatory and sub-section (2) cannot be interpreted as further requiring, nevertheless, an exercise in futility. No magic formula or incantation is necessary to the creation of a valid parole tenancy."

It seems very clear from the evidence that appellant was happy with the small increase of $10 and had in fact paid the increase rent of $230 per month instead of $220 per month with effect from September 1, 1966. He cannot now say he did not consent to the increase. The result is that a new monthly tenancy

at $230 per month arose replacing the earlier monthly tenancy of $220 per month.

Appellant claims protection of the Ordinance. However, under section 15(1)(a) he would lose that protection if at the date of the notice terminating the tenancy he was in arrears of rent for 21 days or upwards after demand in writing and there was no tender thereof at or before such date. Section 15(1)(a) reads:—

"15.—(1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

(a) where at the date of the notice determining the tenancy given by the landlord, rent lawfully due was in arrear for twenty-one days or upwards after demand in writing and there was no tender thereof at or before such date."

Before giving appellant notice to quit dated December 4, 1970 respondent had demanded payment by a notice in Chinese dated November 6, 1970. The demand does not have to be couched in any particular form. Appellant said he tried to make payment soon after he received the notice of demand but respondent refused to accept. Respondent denied that appellant had made such payment as he would have accepted it if it was made soon after the notice of demand as he was then in need of money. The truth is that payment was made after respondent sent appellant the notice to quit. By letter dated December 24, 1970 appellant, through his solicitors, attempted to tender the arrears but they were not accepted. The learned judge did not believe appellant tendered the arrears of rent soon after he received the notice of demand and respondent refused them. For by that time rent was already in arrears for more than 21 days.

For reasons given, the appeal is dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Ibrahim & Co.; Reddi & Co.*

CHU LIP KONG v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3, 1977 and June 19, 1978]

[Kota Kinabalu — Federal Court Civil Appeal No. 56 of 1977]

Revenue Law — Income tax — Profit from sale of land — Land suitable for timber extraction — Whether profits income or capital appreciation — Deductions — Sabah Income Tax Ordinance, 1956, s. 12(1).

The appellant an extractor of timber, had originally bought a piece of land for $320,000. He applied for a timber licence but subsequently had the licence cancelled. The property was then sold to one Chin Yin Kee for $580,000 and on the same day Chin Yin Kee sold it to Kim Hong Co. Ltd., for $595,000. Thereafter the land was worked as a timber concession by Kim Hong Co. Ltd. The Special Commissioners disbelieved the sale of the property to Chin Yin Kee. Revenue claimed that the appellant had made a profit of $176,774 from the transaction and charged the taxpayer to tax on this sum as income derived from trading in timber. The appellant appealed to the Special Commissioners and the High Court on the ground that this sum represented capital appreciation and not income and was therefore not chargeable to tax. The Special Commissioners and the High Court dismissed the appeal and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) there was ample evidence before the Special Commissioners to come to the finding that the difference in the consideration was not a capital appreciation but a profit arising from the taxpayer's trade and therefore chargeable to tax. The learned judge in the High Court also accepted this and it would be wrong for the court to come to any other conclusion;

(2) because of the intervention of Chin Yin Kee, the Special Commissioners were correct in holding that the payment for commission, legal fees and transfer fees claimed as deductions by the appellant were not wholly and exclusively incurred in the production of the income.

FEDERAL COURT.

S. Woodhull (*Thomas Cheah* with him) for the appellant.

Datuk Eusoff Chin, Senior Federal Counsel, for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court, read by Charles Ho J.): The appellant tax-payer bought on October 7, 1964, 6,666 acres (the Kinabatangan property) in Sandakan for $320,000. The price was at the very cheap one of about $50 an acre. The tax-payer was a man of many parts. Among his many roles, he was a cattle farmer as well as an extractor of timber. He said he bought the land for cattle rearing. He had another cattle farm somewhere which was subject to cattle thefts and he intended to transfer his cattle or some of them to this new property. He did nothing of that sort, because he found out that over 5,000 acres were subject to flooding and therefore unsuitable for cattle rearing. But this he found out more than a year after his purchase. However, on March 15, 1966 he secured a timber licence to work this property as a timber-land. He however caused it to be cancelled on October 26, 1966. There were no records of his ever having extracted any timber. On October 25, 1966, i.e. a day previous, he sold the property for $580,000 to Chin Yin Kee. $380,000 was paid on the same day. The balance of $200,000 was guaranteed by two persons, namely Tan Kim Ting and Liew Tze Nyen, by a cheque drawn by Kim Hong Co. Ltd. On the same day, Chin Yin Kee sold the land to Kim Hong Co. Ltd. for $595,000. Thereafter Kim Hong Co. Ltd. worked the land as a timber concession with the necessary licence and from 1967 to 1971 extracted a total of 1,573,400 cubic feet, mainly from the areas that were not subject to flooding.

The Special Commissioners disbelieved the sale of the property to Chin Yin Kee. They did so because there was an admission that the cheque of $200,000 used by Chin Yin Kee to pay the balance of the purchase price was the one issued by Kim Hong Co. Ltd. who was the eventual purchaser of the commercial timber on the property.

Revenue determined that the appellant had made a profit of $176,774 from the transaction and charged the tax-payer to tax on this sum as income derived from trading in timber. The tax-payer appealed to the Special Commissioners and the High Court on the ground that this sum represented capital appreciation and not income and was therefore not chargeable to tax.

Learned counsel for the appellant did not seriously contend against the findings of fact by the Special